

October 20, 2016

EDWARD J. EMMONS, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: October 19, 2016



*Dennis Montali*

DENNIS MONTALI

U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re )  
 ) Bankruptcy Case  
YELLOW CAB COOPERATIVE, INC., ) No. 16-30063DM  
aka All Taxi Electronics, )  
 )  
Debtor. ) Chapter 11

**SUPPLEMENT TO THE COURT'S ORAL RULING ON THE COMMITTEE'S MOTION TO  
FURTHER INVESTIGATE, COMMENCE, PROSECUTE AND SETTLE LITIGATION ON  
BEHALF OF THE BANKRUPTCY ESTATE**

For the reasons announced on the record at a hearing on August 26, 2016, the court ruled that it would grant the Motion of the Official Committee of Unsecured Creditors (the "Committee") for Authority to Further Investigate, Commence, Prosecute and Settle Litigation on Behalf of Bankruptcy Estate Against (I) Taxi Property Company, LLC and its Subsidiaries and Affiliates, (II) Member Medallion Holders, and (III) Directors and Officers of the Debtor (the "Litigation Motion") [Dkt. No. 227]. It entered an order to that effect on September 12, 2016 [Dkt. No. 302].

Yellow Cab Cooperative, Inc. ("Debtor") thereafter filed a motion for additional findings regarding the court's ruling on the Litigation Motion (the "Findings Motion") [Dkt. No. 281], which the court heard on September 30, 2017. While the court believes that additional findings are unnecessary, it nonetheless is

1 supplementing its ruling and the September 12, 2016, order by this  
2 Supplement.

3 Debtors-in-possession have "an obligation to pursue all  
4 actions that are in the best interests of creditors and the  
5 estate" and an unsecured creditors' committee has a close identity  
6 of interests with the DIP in this regard." *In re Spaulding*  
7 *Composites Co., Inc.*, 207 B.R. 899, 904 (9th Cir. BAP  
8 1997). "So long as the bankruptcy court exercises its judicial  
9 oversight and verifies that the litigation is indeed necessary and  
10 beneficial, allowing a creditors' committee to represent the  
11 estate presents no undue concerns." *Id.* Without determining the  
12 ultimate outcome of any such efforts, the court finds that the  
13 theories of recovery and litigation proposed (and ultimately  
14 filed) by the Committee are viable and beneficial and that such  
15 litigation is necessary to the estate. More importantly, the  
16 court finds that the Debtor is not in the best position to pursue  
17 the litigation, as many members of its management could be targets  
18 of such avoidance litigation.

19 In *In re Parmetex, Inc.*, 199 F.3d 1029, 1031 (9th Cir. 1999),  
20 the Ninth Circuit permitted a creditor to pursue an avoidance  
21 action where a chapter 7 trustee had consented to such  
22 prosecution. Although Debtor has not consented here, the reliance  
23 on and adoption by the Ninth Circuit of other cases demonstrates  
24 that a creditor (here, the Committee) can seek and obtain court  
25 leave to prosecute causes of action belonging to a trustee or  
26 debtor-in-possession:

27 Although Defendants are correct that a trustee must  
28 generally file an avoidance action under Chapter 7, we

1 hold that under these particular circumstances-where the  
2 trustee stipulated that the Creditors could sue on his  
3 behalf and the bankruptcy court approved that  
4 stipulation-the Creditors had standing to bring the  
5 suit. See *In re Curry and Sorensen*, 57 B.R. 824, 828  
6 (9th Cir. BAP 1986) ("[t]he exclusive power to commence  
7 avoidance actions vested in trustees and debtors-in  
8 possession is permissive rather than mandatory ... [T]he  
9 creditor may move to ... gain court permission to  
10 institute the action itself."). See also *In re Enserv*  
11 *Co., Inc.*, 64 B.R. 519 (9th Cir. BAP 1986) (following *In*  
12 *re Curry* ), *aff'd by mem.*, 813 F.2d 1230 (9th Cir.  
13 1987); *In re The Gibson Group, Inc.*, 66 F.3d 1436, 1442  
14 (6th Cir. 1995) ("a creditor may have standing to file  
15 an avoidance action if the bankruptcy court determines  
16 that certain conditions exist and certain prerequisites  
17 are met"); *In re Natchez Corp. of West Virginia*, 953  
18 F.2d 184, 187 (5th Cir. 1992) ("A creditor may  
19 [institute an action under section 549] on behalf of the  
20 trustee or debtor-in-possession if it has moved the  
21 bankruptcy court for authorization to do so"); *In re*  
22 *Xonics Photochemical, Inc.*, 841 F.2d 198, 203 (7th Cir.  
23 1988) (creditor could have asked the bankruptcy court to  
24 allow it to bring a form of derivative suit in the name  
25 of the debtor); *In re Vogel Van & Storage, Inc.*, 210  
26 B.R. 27 (N.D.N.Y. 1997) (upholding bankruptcy court's  
27 authorization of suit by creditor because "nothing in  
28 the Bankruptcy Code indicates that a trustee cannot  
authorize a creditor to litigate an avoidance action on  
the trustee's behalf").

*Parmetex, Inc.*, 199 F.3d at 1031.

In support of its reasoning, the Ninth Circuit first cited  
the BAP's *Curry* decision, 57 B.R. at 828. There, the BAP held  
that the limitation on creditors to pursue claims belonging to the  
estate or trustee "is cushioned by the duty imposed on a trustee  
to investigate the conduct of prior management to uncover and  
pursue causes of action against the debtor's officers and  
directors." *Id.* "While pursuant to Section 1107(a) of the Code,  
a debtor in possession is not required to investigate and report  
under Sections 1106(a)(3) and (4), the debtor's directors bear  
essentially the same fiduciary obligation to creditors and

1 shareholders as would a trustee for a debtor out of possession."

2 *Id.*

3 [I]f an aggrieved creditor believes that the  
4 debtor-in-possession has failed to fulfill its duty to  
5 prosecute actions, then the creditor must bring this to  
6 the attention of the court by an appropriate motion.  
7 This promotes the fair and orderly administration of the  
8 bankruptcy estate by providing judicial supervision over  
9 the litigation to be undertaken. (Citations omitted).  
10 This judicial intervention is crucial, for resolution of  
11 the conflict between the creditor and the  
12 debtor-in-possession requires a balancing of the  
13 competing interests to determine whether or not the  
14 debtor-in-possession's failure to bring the action is  
15 unjustifiable and therefore constitutes an abuse of  
16 discretion. (Citation omitted). At such a hearing the  
17 court can determine if the initiation of such an action  
18 at that time would forward the reorganization effort, or  
19 to the contrary, might be a detriment.

20 *Id.* (emphasis added). Here, Debtor has not commenced any actions  
21 against those that may have been the beneficiaries of preferential  
22 or fraudulent transfers, and the court finds that the current  
23 management of debtor are not in the position to vigorously pursue  
24 such actions as they are potential defendants. The Sixth  
25 Circuit's decision in *Gibson Group*, another case upon which the  
26 Ninth Circuit relied in *Parmetex*, is the one most cited by courts  
27 in addressing the ability of creditors' committees to pursue  
28 claims that are ordinarily prosecuted by debtors-in-possession or  
trustees. The Sixth Circuit held that the existence of a conflict  
of interest by debtor's management in addition to the debtor's  
failure to pursue colorable claims provides sufficient reason to  
allow a creditor's committee to prosecute such claims. *Gibson*  
*Grp., Inc.*, 66 F.3d at 1442-43. There is no need to make any  
further analysis, whether on a cost-benefit basis or otherwise.  
The Debtor is insolvent and the Committee (or a trustee if one is

1 appointed and the authority to prosecute is no longer left with  
2 the Committee) is able to make such an analysis if and when  
3 appropriate. The conflicts that prospective defendants have  
4 disqualify them from making such an analysis or the critical  
5 decisions that follow.

6 The claims asserted by the Committee appear colorable, the  
7 Debtor has thus far refused to initiate such claims, and some  
8 members Debtor's management appear to have a vested interest in  
9 delaying or stopping such litigation. Therefore, under *Parmetex*,  
10 *Curry*, and *Gibson Group*, the Committee should have been (and was)  
11 granted leave to pursue the avoidance claims.

12 \*\*\* END OF SUPPLEMENT \*\*\*  
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